FH

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

MDD/149357

PRELIMINARY RECITALS

Pursuant to a petition filed April 30, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Milwaukee Enrollment Services in regard to Medical Assistance, a hearing was held on July 03, 2013, at Milwaukee, Wisconsin.

The issue for determination is whether the Disability Determination Bureau (DDB) correctly determined that Petitioner is not disabled for purposes of receiving Medicaid.

The record was held open until 8/2 to give Petitioner an opportunity to submit additional medical documentation. No documentation was received by the designated deadline.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[redacted]

Petitioner's Representative:

[redacted]

Petitioner' Witness: [redacted]

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703
By: DDB by file

ADMINISTRATIVE LAW JUDGE:
Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Milwaukee County.
2. On July 19, 2012, Petitioner applied for Medicaid benefits under a Presumptive Disability. This application was approved on September 6, 2012. (DDB file)

3. On August 14, 2012, Petitioner applied for regular Disability-based Medicaid benefits asserting that she is disabled by alcohol dependence and hepatitis. (DDB file)

4. On August 21, 2012, the Milwaukee County Circuit Court deemed Petitioner to "lack evaluative capacity in full" to make major decisions about her healthcare, vocational training, mobility or release confidential information and appointed Petitioner's sister, SR to be her guardian of the person. (DDB file – Letters of Guardianship of the Person Due to Incompetency, Case No. 12-GN-315)

5. On February 16, 2013, the DDB sent Petitioner a notice, denying her application for Disability-based Medicaid benefits. (DDB file)

6. On March 7, 2013, Petitioner filed a request for reconsideration, asserting that she was disabled by alcohol induced dementia, depression and a neuropathy in her foot. (DDB file)

7. On May 6, 2013, the DDB again denied Petitioner's application and on May 15, 2013 forwarded the file to the Division of Hearings and Appeals for review. (DDB file)

8. Petitioner has been diagnosed with alcoholism, alcoholic hepatitis, hepatic encephalathy, and alcoholic dementia with poor memory. Petitioner is currently prescribed Aricept to treat her dementia, though she has not been able to purchase the medication since losing Medicaid benefits that were previously granted under a presumptive disability. (DDB file; Findings of Dr. Beth Jennings, Ph.D; Testimony of Petitioner's guardian/sister, SR)

9. Petitioner's most significant issue is with her memory. While she does not notice her own memory lapses, she does need constant reminders to keep appointments, to take her medications, to shower, wash her hair, change her clothing and to pay bills. (Testimony of Petitioner, Testimony of SR, and testimony of Petitioner's other sister JR)

10. Although Petitioner enjoys reading, she constantly needs to re-read chapters and paragraphs, because she forgets what she has read. Petitioner frequently has difficulty remembering how far she read in a book after putting it down. (Testimony of SR)

11. Petitioner's medical records from her hospitalization in 2012 and her stay at Colonial Manor, a skilled nursing facility, indicate that Petitioner had difficulty remember conversations she had earlier in the day, that she needed information repeated to her several times because she would forget what she was told and that follow through with instructions was poor because of her memory deficits. (DDB file)

DISCUSSION

A person between ages 18 and 65, with no minor children, must be blind or disabled to be eligible for MA. In order to be eligible for Medicaid as a disabled person, an applicant must meet the same tests for disability as those used by the Social Security Administration to determine disability for Supplemental Security Income (Title XVI benefits). *§ 49.47(4)(a)4, Wis. Stats*. Title XVI of the Social Security Act defines "disability" as the inability to engage in any substantial gainful activity due to physical or mental impairments which can be expected to either result in death or last for a continuous period of not less than 12 months.

Although the determination of disability depends upon medical evidence, it is not a medical conclusion; it is a legal conclusion. The definitions of disability in the regulations governing MA require more than mere medical opinions that a person is disabled in order to be eligible. There must be medical evidence that an impairment exists, that it affects basic work activities, that it is severe, and that it will last 12 months or longer as a severe impairment. Thus, while the observations, diagnoses, and test results reported by the Petitioner's physicians are relevant evidence in determining impairment, the doctors' opinions as to whether the petitioner is disabled for the purposes of receiving MA are not relevant.

The DDB found Petitioner to suffer from a severe impairment, but it also found that despite the impairment, Petitioner is still able to engage in substantial meaningful activity based upon the tests described below.

Under the regulations established to interpret Title XVI, a claimant's disability must meet the 12-month durational requirement before being found disabling. In addition, the disability must pass five sequential tests established in the Social Security Administration regulations. Those tests are as follows:

1. An individual who is working and engaging in substantial gainful activity will not be found to be disabled regardless of medical findings. *20 CFR 404.1520 (b)*.

2. An individual who does not have a "severe impairment" will not be found to be disabled. A condition is not severe if it does not significantly limit physical or mental ability to do basic work. *20 CFR 416.921(c).*

3. If an individual is not working and is suffering from a severe impairment which meets the duration requirement and meets or equals a listed impairment in Appendix I of the federal regulations, a finding of disabled will be made without consideration of vocational factors (age, education, and work experience.) *20 CFR 404.1520(d).*

4. If an individual is capable of performing work he or she has done in the past, a finding of not disabled must be made. *20 CFR 404.1520(f).*

5. If an individual's impairment is so severe as to preclude the performance of past work, other factors, including age, education, past work experience and residual function capacity must be considered to determine if other types of work the individual has not performed in the past can be performed. *20 CFR 404.1520(g).*

These tests are sequential. If it is determined that an applicant for MA is employed or does not suffer from a severe impairment it is not necessary to proceed to analyze the next test in the above sequence.

TEST 1

The first test asks whether an individual is working and engaging in substantial gainful activity.

"Substantial activity" is defined as, "work activity that involves doing significant physical or mental activities. Your work may be substantial, even if it is done part time basis….." *20 CFR 404.1572(a)*

"Gainful work activity" is defined as, "work activity that you do for pay or profit. Work activity is gainful if it is the kind of work usually done for pay or profit, whether or not a profit is realized." *20 CFR 404.1572(b)*

Earnings can be used to determine whether a person is engaging in substantial gainful activity. *20 CFR 404.1574(a) and (b).* The 2011 substantial gainful activity (SGA) income limit was $1000 per month. (*Please see* www.ssa.gov/pressoffice/factssheet/colafacts2011.htm)

Petitioner is not currently working. As such, she passes test 1.

TEST 2

Petitioner passes test 2 because the DDB found that she does have a severe impairment.

TEST 3

The question presented here is whether petitioner's impairment meets the criteria listed in Appendix 1 to Subpart P of Part 404 of the Code of Federal Regulation (CFR). (This is commonly referred to as the "Listing Criteria") If Petitioner meets the aforementioned criteria, tests 4 and 5 do not need to be done; she qualifies as disabled. If Petitioner does not meet the criteria, then she must pass tests 4 and 5 to be considered disabled.

Appendix 1, subsection 12.02 deals with organic brain disorders. (Petitioner's alcoholic induced dementia falls into this category.) It states that in order to qualify for MA, a person with an organic brain disorder must meet the following criteria:

A. Demonstration of a loss of specific cognitive abilities or affective changes and the medically documented persistence of at least one of the following:

    1. Disorientation to time and place; or
    2. Memory impairment, either short-term (inability to learn new information), intermediate, or long-term (inability to remember information that was known sometime in the past); or
    3. Perceptual or thinking disturbances (e.g., hallucinations, delusions); or
    4. Change in personality; or
    5. Disturbance in mood; or
    6. Emotional lability (e.g. explosive temper outbursts, sudden crying, etc.) and impairment in impulse control; or
    7. Loss of measured intellectual ability of at least 15 I.Q. points from premorbid levels or overall impairment index clearly within the severely impaired range on neuro-psychological testing, e.g., the Luria-Nebraska, Halstead-Reitan, etc.

AND

B. Resulting in at least two of the following:

    1. Marked restriction in activities of daily living; or
    2. Marked difficulties in maintaining social functioning; or
    3. Marked difficulties in maintaining concentration, persistence, or pace; or
    4. Repeated episodes of decompensation, each of extended duration;

OR

C. Medically documented history of a chronic organic mental disorder of at least 2 years' duration that has caused more than a minimal limitation of ability to do basic work activities, with symptoms or signs currently attenuated by medication or psycho-social support, and one of the following:

    1. Repeated episodes of decompensation, each of extended duration,
    2. A residual disease process that has resulted in such marginal adjustment that even a minimal increase in mental demands or change in the environment would be predicted to cause the individual to decompensate; or
    3. Current history of 1 or more years' inability to function outside a highly supportive living arrangement, with an indication of continued need for such an arrangement.

CFR, Appendix 2 to Subpart B of Part 404 (12.02)

According to a Weschler Memory Scale – Third Edition evaluation performed upon Petitioner in December 2012 and January 2013, Petitioner does exhibit some memory impairment, but there is no accompanying report interpreting the data. (See DDB file) However, the Case Development Worksheet entry for October 31, 2012, indicates that the DDB was questioning the evaluator's conclusion that Petitioner is only mildly impaired because Petitioner's general memory was in the low/borderline range and her visual immediate and visual delayed memory are in the impaired range. Further, when Petitioner was discharged from the Hospital to

Colonial Manor, a sub-acute nursing facility, the discharge summary indicated that despite having been in the hospital for three months, Petitioner did not understand that the primary cause for her hospitalization was alcohol abuse. The discharge summary also indicated that Petitioner would not remember conversations she had with staff earlier in the day.

Petitioner's psychiatric records from Colonial Manor describe Petitioner's memory issues as "immediate" and indicated that Petitioner exhibits very poor short term memory as demonstrated by repetitive questioning about things that were already answered. The records from Colonial Manor further indicate that Petitioner's "short term memory deficits make it difficult for her to recall much of the information that is shared with her. As such, her follow-through is poor…" (See DDB file) This is consistent with the testimony of Petitioner's sisters. Based upon all of the foregoing, it is found that Petitioner suffers from a memory impairment and therefore meets the "A" listing criteria. However, she does not meet two of the "B" listing criteria.

Petitioner does exhibit some restriction in her activities of daily living, because she forgets to perform then and needs constant reminders to bathe, get dressed, pay her bills and take her medications, but the record does not show that Petitioner meets any of the other "B" listing criteria.

There is no indication in the record that Petitioner has difficulty with maintaining social functioning. The medical records from Colonial Manor indicate that Petitioner was pleasant, though depressed and anxious. There is also no indication in the record that Petitioner struggles with concentration. Indeed, she indicated that she will read and re-read passages or chapters to get through a book, though she often forgets where she was in the book. Petitioner also testified that she will go on-line and read e-mail, the newspaper or visit various websites, although again, she will not necessarily remember what she read. Finally, there is nothing in the record indicating that Petitioner's memory and cognitive deficits have resulted in repeated episodes of decompensation. Indeed, Petitioner's last hospitalization for issues with dementia occurred in August 2012.

Because Petitioner does not meet both "A" and "B" criteria, the remaining question is whether she meets any of the "C" criteria of the listing. Regrettably, there is insufficient information in the record to find that Petitioner meets any of the "C" listing criteria. As discussed above, the record does not show that Petitioner has had repeated episodes of decompensation. There is no indication that Petitioner suffers from a residual disease process that would cause her to decompensate if conditions changed. Indeed, Petitioner did not complain of any difficulties transitioning from Colonial Manor to her mother's home. Further, is there is no indication that Petitioner has had a history of at least one year, of being unable to live outside a highly structured environment.

Because the evidence is inconclusive with regard to whether Petitioner meets the listings under the Appendix 1 to Subpart P of Part 404 of Code of Federal Regulation, it is necessary to proceed to tests 4 and 5.

TEST 4

The fourth test asks whether Petitioner is capable of work she performed in the past. Per *40 CFR 404.1560 (b)(1),* the question more specifically, is did Petitioner engage in substantial gainful activity (significant physical or mental activities for which she could have been paid) within the past 15 years, and if so, can Petitioner continue to perform that work?

It is unclear from the DDB whether the DDB made a determination with regard to the fourth test, but it is reasonable to conclude that the DDB found Petitioner to be unable to perform past work, because it determined that Petitioner had sufficient residual functional capacity to NOT pass test 5; that is to be found NOT disabled.

Petitioner testified that she last worked 3-5 years ago in restaurant waitressing and bartending. Petitioner also testified that she worked routes sales. When asked to explain what route sales were, Petitioner struggled to find an answer but indicated that she would go to various businesses. Petitioner further indicated that at one point she worked at a drycleaner. According to the Work History Report contained in the DDB file, Petitioner most recently worked as a bartender/manager at a restaurant between April 2007 and June 2010. Prior to his

she worked as a route manager for a dry cleaner, as an Airborne Express driver and as a bartender at Paper Valley Hotel.

Given Petitioner's short term memory deficits, it seems unlikely that she would be able to return to work waitressing or bartending, since she would be required to remember drink and food orders, nor would she be able to return to work as a driver or route manager, because she would have to be able to remember where she was going and what was being delivered to whom.

Based upon the foregoing, Petitioner passes the fourth test.

TEST 5

This test asks whether Petitioner can perform any other work, despite her limitations. The DDB file appeared to conclude that, based upon the criteria found in *Part 404, Subpart P, Appendix 2*, *part 202.21*, Petitioner was not disabled because at the time of her application, she was considered a younger individual (age 45-49); had education consisting of a high school diploma or greater; and had previously performed unskilled and semi-skilled labor. The DDB concluded that Petitioner has the ability to perform light, "routine" work.

However, Part 404, Subpart P, Appendix 2, §200, states:

> Where the findings of fact made with respect to a particular individual's vocation factors and residual functional capacity coincide with all the criteria of a particular rule, the rule directs a conclusion as to whether the individual is or is not disabled. <u>However, each of these findings of fact is subject to rebuttal…Where any one of the findings of fact does not coincide with the corresponding criterion of a rule, the rule does not apply in that particular case and, accordingly, does not direct a conclusion of disabled or not disabled.</u> In any instance where a rule does not apply, full consideration must be given to all of the relevant facts of the case in accordance with the definitions and discussions of each factor in the appropriate sections of the regulations.
>
> ….
>
> If an individual's specific profile is not listed within this appendix 2, a conclusion of disabled or not disabled is not directed…an individual's ability to engage in substantial gainful activity …is decided on the basis of the principle and definitions in the regulations, giving consideration to the rules of specific case situations in this appendix 2. These rules…provide an overall structure for evaluation of those cases in which the judgments as to each factor do not coincide with those of any specific rule….
>
> *Emphasis added*

Thus, the ultimate question posed by Test 5, regardless of Petitioner's age, work history and level of ability to communicate in English, is whether Petitioner can engage in any type of substantial gainful activity at all.

The definition of light work is found at 20 C.F.R. § 404.1567 and provides as follows:

> (b) Light work. Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

The definition of sedentary work is found at 20 C.F.R. § 404.1567 and provides as follows:

> (a) Sedentary work. Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

The foregoing definitions are useful in determining whether an individual can physically perform certain tasks, but they do not account for mental or psychological limitations. While Petitioner might be physically capable of performing light or sedentary work, her memory issues make it unlikely that she would be able to obtain meaningful employment performing such work. Indeed, Petitioner's sisters testified credibly that Petitioner needs constant reminders to shower, change her clothes, to pay bills and take her medications. Petitioner's medical records indicate that she had poor follow through because of her memory issues and that she needed a lot of repetition, because she would forget what staff had just told her. Most significantly, the circuit court has deemed Petitioner to be incompetent and lacking in evaluative capacity to give informed consent, to choose medical, social and supported living services, to make decisions regarding education and vocational placement and support services or employment, to receive notices, or to act as her own advocate. *See* court order in case 12-GN-315 *Emphasis added*. Based upon all of the foregoing, I find that Petitioner is not capable of engaging in even in sedentary work.

I also note the following:

20 CFR §404.1560(c)(1) states, "If we find that your residual functional capacity is not enough to enable you to do any of your past relevant work…we will look at your ability to adjust to other work…Any other work (jobs) that you can adjust to must exist in significant numbers in the national economy (either in the region where you live or in several regions in the country.)"

20 CFR §404.1560(c)(2) further states that, "In order to support a finding that you are not disabled at this fifth step of the sequential evaluation process, we are responsible for providing evidence that demonstrates that other work exists in significant numbers in the national economy that you can do…"

The DDB provided no documentation or suggestion of what other work exists in significant numbers in the national economy that Petitioner can do given her age, education, work experience and limitations. A vague assertion that there is some job out there that Petitioner can do hardly satisfies the DDB's responsibility stated above.

Petitioner passes test 5.

CONCLUSIONS OF LAW

Petitioner is incapable of performing even sedentary work for any meaningful period of time and is therefore disabled for purposes of receiving Medicaid.

THEREFORE, it is ORDERED

The county agency shall review Petitioner's application for Medicaid and issue any requests for verification it deems necessary within 10 days. The county agency shall, within 10 days of receipt of said verification, certify Petitioner as eligible for Medicaid, if she is otherwise qualified for Medicaid.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 6th day of August, 2013.

_____

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on August 6, 2013.

Milwaukee Enrollment Services
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